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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 961

CALVIN KOVENS and LEON COHEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Calvin Kovens and Leon Cohen, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on November 27, 1964.

Citation to Opinion Below.

The opinion delivered in the court of appeals for the fifth circuit by Chief Judge Tuttle, concurred in by Circuit

Judges Jones and Gewin, is officially reported at 338 F. 2d 611 and is printed in the appendix hereto.

Jurisdiction.

1. The judgment of the court of appeals sought to be reviewed was dated and entered November 27, 1964.

2. Petitioners' timely petition for rehearing was denied by the court of appeals by order dated February 4, 1965. No extension of time to petition for certiorari has been requested or granted.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U. S. C. § 1254(1).

Questions Presented.

1. Upon the trial of charges that petitioners conspired to make and that Kovens made and Cohen caused to be made false statements knowingly and wilfully for the purpose of influencing a Federal Savings and Loan Association in advancing funds pursuant to a construction loan agreement (allegedly violating Title 18 U. S. C. § 1014), were petitioners entitled to introduce evidence showing that they dealt with the Association in good faith and that neither they nor the Association officials, in routinely using the printed forms containing the alleged false statements, considered those forms as having the meaning attributed to them by the prosecution?

2. Upon such a trial, is it error for the trial judge to instruct the jury that, "unless the contrary appears from the evidence," the jury could infer that petitioners intended all the consequences of their acts?

Statutes Involved.

The federal statutes involved are Title 18 U.S.C. § 1014, which provides in relevant part that:

> "Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of . . . a Federal Savings and Loan Association . . . upon any application, advance . . . or loan . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both."
>
> Title 18 U.S.C. § 1014,

and Title 18 U.S.C. § 371, which provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."
>
> Title 18 U.S.C. § 371.

Statement.

In 1958 Miami Beach Federal Savings and Loan Association agreed to lend $742,000 to Ruedd, Inc., to finance the construction of a shopping center on Ruedd, Inc.'s land by Cal Kovens Construction Corp., of which petitioners Kovens and Cohen were president and secretary, respectively. The arrangements were generally that the net loan proceeds of approximatly $700,000, together with $300,000 to be provided by the owner (being the difference between the loan proceeds and the construction contract

price), would be deposited in escrow and disbursed as construction progressed by means of draws made by the Association at the request of the contractor.

In six counts of the indictment it was charged that on three occasions, in violation of Title 18 U.S.C. § 1014, Kovens made and Cohen caused to be made a false statement knowingly and wilfully "for the purpose of influencing the action of the Miami Beach Federal Savings and Loan Association . . . in advancing funds," in that they submitted and caused to be submitted three construction draws

> "requesting payment of the sum of [$149,946.86 on December 8, 1958; $149,537.84 on January 9, 1959; $353,759.82 on February 23, 1959] from funds held in escrow by the said Miami Beach Federal Savings and Loan Association for the said Ruedd, Inc. pursuant to the terms of the said Construction Loan Agreement, and certifying that the funds enumerated in the said Construction Draw and itemized on the reverse side thereof had been expended for the sole purpose of constructing the improvement on the property described therein, whereas in truth and in fact as [petitioners] well knew, the said Construction Draw was false in that the entire amount of the funds enumerated in the said Construction Draw and itemized on the reverse side thereof was not expended for the sole purpose of constructing the improvement on the property described therein. . . ."
>
> Counts 1, 2, 3, 6, 7, 8; R. 4-12.

In Count 10 of the indictment it was charged that petitioners conspired, in violation of Title 18 U.S.C. § 371, to make false statements to the Association in violation of § 1014.

As part of the routine procedure for drawing down the escrow funds as construction progressed, Cal Kovens

Construction Corp. submitted to the Association a number of printed forms of the Association entitled "Construction Draw," each of which requested payment of a certain amount of the funds in escrow. The draws that were the subject of the indictment (Government's Exhs. 19, 21, 22; R. 880, 885, 889) were prepared by Cohen and the office staff (R. 587). In determining the appropriate amount of each such draw, they took into consideration

> "the amount of money that has been paid to sub-contractors, the amount of money that will be paid to subcontractors, unpaid bills that are in the file, conferences that I or other estimators may have with various sub-contractors and anticipating their billing for work that had already been done and also reports from the field from engineers working for the company, estimators working for the company, expediters working for the company who turn in reports to the office, telling us how much work has been done in the field, and also by sometimes, a lot of times, by my own visual inspection of the job and discussions with the superintendent on the job."
>
> R. 587.

The construction draw dated December 8, 1958 (Government's Exh. 19, R. 880), which in form is representative of the others, recited:

> "To: Miami Beach Federal Savings and Loan Association: Draw in the sum of One Hundred Forty-nine Thousand Nine Hundred Forty-six & 86/100 ($149,946.86) Dollars is hereby requested on the Construction Escrow funds of Ruedd, Inc., deposited with the Association to cover the construction of the improvement on the following described property..."

The amount requested by the draw was inserted also in the form of affidavit which appears as part of the same document, in this way:

> "That the funds requested in the sum of One Hundred Forty-nine Thousand, Nine Hundred Forty-six & 86/100 ($.....) Dollars, enumerated in the draw above and itemized on the reverse side hereof have been expended for the sole purpose of constructing the improvement on the following described property. . . ."
>
> R. 880.

The proofs show that none of the construction draws submitted contained an itemization of the funds requested or of a prior expenditure of an amount equal to the funds requested.* But, as part of the routine handling of the construction draws, the contractor also submitted, at or about the time each draw was submitted, a paper called "requisition" (R. 882, 887, 981), which classified the total construction into various "items" such as "concrete" and "lumber" and showed what part of the total sum sought to be drawn was requisitioned for each part of the total construction effort. The contractor also submitted several printed forms executed by or on behalf of various subcontractors (Government's Exhs. 1, 3, 5, 6, 7, 10, 11, 13, 15, 22B; R. 841, 844, 847, 848, 850, 854, 855, 858, 861, 893-98), by which the subcontractors waived or released any lien they might have had on the property in consideration of the payment of a stated sum, the receipt of which was thereby acknowledged.

It was the theory of the prosecution that Kovens and Cohen, in submitting each draw document, intended to represent and thereby represented to the Association that the contractor had theretofore paid in cash, to each subcontractor in whose name a waiver or release of lien was submitted, the full amount receipted for in that waiver

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* Sometime after the draws were submitted, an employee of the Association wrote on the back of each draw (R. 880, 885, 889) a reference to a "schedule attached," which was not attached to the draw when it was submitted (R. 406-07, 422, 427).

or release of lien or, in the case of a subcontractor who waived his lien "in consideration of the payment of the sum of One Dollar ($1.00), the receipt whereof is hereby acknowledged, and other valuable consideration, and benefits to the undersigned accruing" (R. 896), the full amount listed in the requisition paper opposite the item of work that that subcontractor was engaged in. Thus, the Government contended that petitioners falsely stated to the Association, by submitting each construction draw, that an amount equal to the sum sought to be drawn had previously been paid to subcontractors as purportedly itemized in the requisition document or in the releases or waivers of lien. In fact, petitioners had no idea of making such a representation. The amounts requested in the draws were based not simply on what had been paid to subcontractors but also upon the value of work and materials which had then been incorporated in the job by subcontractors and also by the contractor itself, with its own employees (R. 587).

In the course of the trial, petitioners sought repeatedly to correct the prosecution's erroneous premise that the escrow funds were not to be disbursed by the Association except upon a showing by the contractor that sums of money aggregating the amount of each draw had been paid in cash, at the time of the draw, to the subcontractors and materialmen whose work was then incorporated in the job. In truth, the funds were to be disbursed in accordance with the usual practices followed in such transactions, as and when the Association became satisfied, on the basis of its on-site inspections, that the value of the work and material incorporated in and stored at the job site justified the disbursement sought. The trial court, stating that "we have defined the issues narrowly in this case" (R. 563), repeatedly prevented petitioners from making that showing.

Specifically, the trial court prevented petitioners from establishing, by cross examining the Associations' vice-president with whom they dealt, that the "standard rule . . . for disbursement of those [escrow] funds" (R. 566) contemplated that draws would be made on the basis of the value of labor and materials incorporated in the work and of materials suitably stored at the site, as provided in the standard AIA form of contract between the contractor and owner (R. 922).

The trial court prevented Kovens from testifying that the Associations' vice-president with whom he dealt had told Kovens that "they were not concerned with any draws" and that the Association was satisfied with the progress of construction revealed by the Association's inspections made before the draws were approved (R. 636, 649, 650-51).

The court refused to permit petitioners to demonstrate a reasonable basis for their good faith belief that the construction draws were in order: that it is "a universal custom in this area, even now" (R. 579), for "loans of this same type and same category" to be disbursed on the basis of work and materials incorporated in the job and not only on the basis of paid bills (R. 579); that it was a common and accepted business practice in the Miami area, known to contractors and banking institutions as well, that subcontractors and materialmen customarily waive their liens on work for which they anticipate payment but for which they have not been paid (R. 310, 311); and that

> ". . . it is known by both sides that that does not mean that the bills, or the amounts indicated by the request on the construction draw and partial release of lien have in fact been paid prior to that time."
>
> R. 581.

At the instance of the Government, the trial court prevented petitioners from showing that, at the time each draw was submitted, the contractor had expended in the project an amount exceeding the amount of money sought to be drawn (R. 486, 678).

Although petitioners never conceded that the construction draws were intended to represent that particular sums had been paid to particular subcontractors for particular work incorporated in the project, petitioners sought to show that they gave one of the subcontractors a promissory note in payment for paving work done on the job (R. 651). The trial judge decided as a matter of law that the note could not constitute payment within the assumed meaning of the statement assumed to have been made by the construction draw, and so excluded the note from evidence and instructed the jury to disregard the testimony that the note had been given (R. 660-61).

At the conclusion of the case, over objection by petitioners (R. 794-95), the trial judge instructed the jury as follows:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done by the accused."
>
> R. 786.

Upon their conviction, petitioners appealed to the court of appeals for the fifth circuit. That court affirmed the convictions and stated, with respect to the trial court's rulings excluding the evidence offered by petitioners to

show their good faith in dealing with the Association, that:

> "Proof which would be relevant on the issue of general fraud is not necessarily relevant on a determination of whether the statements here involved were in fact true or false. With this construction of the alleged offense in mind, we conclude that the trial court did not err in rejecting the testimony tendered by the appellants."
>
> 338 F. 2d at 617-18.

Reasons for Granting the Writ:

The court of appeals has effectively eliminated the element of criminal intent from the offense proscribed by Title 18 U.S.C. § 1014 and thus

(1) has decided an important federal question in a way that conflicts with the decision of this Court in *Morissette* v. *United States* (1952), 342 U. S. 246;

(2) has decided an important federal question in a way that conflicts with the decisions of other courts of appeals in *Smith* v. *United States* (6th Cir. 1956), 230 F. 2d 935; *Rhodes* v. *United States* (4th Cir. 1960), 282 F. 2d 59; and *United States* v. *Niro* (2d Cir. 1964), 338 F. 2d 439; and

(3) has sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

By the evidence that was excluded, petitioners sought to demonstrate that the arrangements made by the Association and the contractor for disbursement of the con-

struction escrow funds were not those that the Government insisted upon, imposing its own interpretation on the ambiguous language of a printed form of draw. Petitioners sought to demonstrate, at the very least that they honestly believed that the arrangements were other than as asserted by the Government and that they had a reasonable basis for their belief. In short, petitioners sought, by the evidence excluded, to demonstrate their good faith.

The court of appeals held that the issue in this criminal case was "whether the statements here involved were in fact true or false" (338 F. 2d 617-18) and accepted, as a premise, that the construction draws were intended by petitioners and were understood by the Association as making the representations attributed to them by the Government. And the court of appeals approved the ruling of the district court which prevented petitioners from showing the contrary.

The decisions of the district court and of the court of appeals in this case are strikingly similar to the decisions of the lower courts which were reversed by this Court in *Morissette* v. *United States* (1952), 342 U.S. 246. Morissette was accused of having knowingly and wilfully converted to his own use three tons of spent bomb casings, the property of the United States, in violation of Title 18 U.S.C. § 641. He claimed he thought the casings were cast-off and abandoned and sought to have the jury consider whether he acted in good faith. Evidence was admitted that would have supported a finding that "the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk" (342 U.S. at 276), but the trial court held that Morissette could not show he thought the property was abandoned and that the jury could not conclude that he did.

Reversing, this Court noted that the terms of the statute required that the forbidden act be committed "knowingly" but not that it be committed "wilfully," and held that

> "mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced."
>
> 342 U.S. at 263.

Furthermore, this Court held:

> "The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative."
>
> 342 U.S. at 263.

This Court concluded that Congress had not affirmatively dictated an elimination of the element of criminal intent from the offense with which Morissette was charged, and reversed the conviction.

In this case, as in *Morissette*, the district court and the court of appeals held, upon an indictment charging that the accused acted wilfully and knowingly in violation of a statute which in terms proscribes only those acts that are done knowingly, that the issue to be decided by the jury is whether the act was done. Petitioners sought to show that the statements attributed to them were neither intended by them nor understood by the Association as having the meaning attributed to them by the Government. Yet, the court of appeals held that this evidence was

> "not necessarily relevant on a determination of whether the statements here involved were in fact true or false."
>
> 338 F. 2d 617-18.

The courts below have, in effect, read out of section 1014 the element of criminal intent. The strictures imposed on the defense in this case were calculated to and did strip petitioners of the benefit they were entitled to from innocence of evil purpose and circumscribed the freedom that the jury was entitled to exercise. The case was tried in a partial vacuum, in which the court allowed little elucidation of the events in question independent of the documents. Thereby the prosecutor was enabled to construe the documents as it pleased him to construe them and, on erroneous inferences extracted from those documents, to demand that petitioners be convicted upon an wholly imaginary scheme to deceive and cheat the Association. The conviction was virtually assured when, after refusing to permit petitioners to show the truth about what they did intend, the trial court instructed the jury that,

> "unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done by the accused."
>
> R. 786.

By instructing the jury as he did, after preventing petitioners from showing the wholly reasonable and innocent basis for their handling of the construction draws, the court effectively required the jury to accept the prosecutor's view

of the facts. In this way, too, the trial judge departed from the principle announced by this Court in *Morissette*:

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. State court authorities cited to the effect that intent is relevant in larcenous crimes are equally emphatic and uniform that it is a jury issue. The settled practice and its reason are well stated by Judge Andrews in People v. Flack, 125 N.Y. 324, 334, 26 N.E. 267, 270, 11 L.R.A. 807; 'It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system, (unless in exceptional cases,) both must be found by the jury to justify a conviction for crime. However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury. * * *'
>
> "It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. . . .
>
> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the

> jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. . . .
>
> "Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, 'Did he intend to take the property?' That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances."
>
> 342 U.S. at 274-76.

The court of appeals for the fifth circuit had previously recognized, in *Mann* v. *United States* (5th Cir. 1963), 319 F. 2d 404, that it is improper, in a case in which a showing of criminal intent of a specific character is required for conviction, to charge the jury that, "unless the contrary appears from the evidence," the jury could infer that the accused intended the natural and probable consequences of acts knowingly done. Yet in this case, the court of appeals condoned the giving of that instruction.

The decision below conflicts not only with this Court's prior decision in *Morissette* but also with the decision of

the court of appeals for the sixth circuit in *Smith* v. *United States* (6th Cir. 1956), 230 F. 2d 935, in which the court reversed convictions for violations of Title 18 U.S.C. § 1010, for knowingly making false statements in applications for Federal Housing Administration loans. In that case, in which the defendant signed a loan application reciting that the loan proceeds be used for the addition of a room and the installation of an attic fan, the trial judge instructed the jury that the defendant should be convicted if at the time he signed the application he knew the proceeds would be used, instead, for payment of other outstanding loans and obligations. Reversing, the court stated:

> "This particular part of the instruction ignored the element of criminal motive and guilty mind. It took no account of the fact, undisputed, that a bank official in charge of FHA loans had told Troy Smith a loan could properly be secured under the FHA statute to pay for improvements already completed, that is, for existing debts."
>
> 230 F. 2d at 938.

The decision below conflicts also with the decision of the Court of Appeals for the Fourth Circuit in *Rhodes* v. *United States* (4th Cir. 1960), 282 F. 2d 59 (a prosecution for a purported violation of section 1014 of Title 18), in which the Court held that:

> "An intent beyond the mere doing of the act is not invariably required. Where, however, it is inherent in the offense, or the statute creating it prescribes as part of the definition that a specific state of mind shall accompany the act, as this statute does, a full exposition of the pertinent evidence is permitted if properly tendered."
>
> 282 F. 2d at 60.

The decision below conflicts also with the decision of the court of appeals for the second circuit in *United States* v. *Niro* (2d Cir. 1964), 338 F. 2d 439 (a prosecution for a purported violation of section 1014 of Title 18), in which that court, speaking of the same section of the criminal code as is here involved, stated that

> "The words 'for the purpose of influencing' were included in the statute to define the quality of the required intent. . . ."
>
> 338 F. 2d at 441.

and approved the trial court's instruction that

> " 'To act "for the purpose of influencing" means to act knowingly and with the specific intent to mislead, deceive, or cheat, for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.' "
>
> 338 F. 2d at 440, note 2.

In *Kay* v. *United States* (1938), 303 U. S. 1, speaking of former Title 12 U.S.C. § 1467 (now incorporated in section 1014 of Title 18), this Court held it to be the purpose of that statute "to require that the information be given in good faith and not falsely with intent to mislead." 303 U. S. at 6.

It has thus been made certain, not only by the language of section 1014 itself but also by the decisions of this Court and of other courts of appeals, that the statute under which petitioners have been convicted is not one of those special statutes referred to in *Morissette* which forbid the mere doing of an act, which do not "specify intent as a necessary element," and which impose "relatively small" penalties for "neglect where the law re-

quires care, or inaction where it imposes a duty." 342 U. S. 246, 255-56.

The Government did not contend in this case that it was unnecessary to allege and prove that petitioners acted with criminal intent. By its indictment the Government charged that petitioners acted "knowingly and willfully" and "for the purpose of influencing" the Association (R. 4 *et seq.*). The whole thrust of the prosecutor's argument to the jury was that petitioners undertook, by means of the false statements in the construction draws, to deceive the Association and to induce the Association to disburse funds that the contractor was not entitled to (R. 733-37, 764-72). The prosecutor entreated the jury to "stop this sort of thing and protect Savings Association depositors" (R. 737).

These convictions were obtained because the Government was successful in its assertion, made plausible by an wholly inadequate revelation of the circumstances surrounding the transaction, that petitioners acted dishonestly toward the Association. By refusing to permit petitioners to show that they dealt in good faith with the Association and in strict accordance with what they believed was the true understanding between the parties and by instructing the jury that, "unless the contrary appears from the evidence," the jury might infer that petitioners intended all the consequences of their acts (R. 768), the trial court read out of section 1014 the explicit and historic requirement that the accused have acted for the forbidden purpose and with criminal intent. The court of appeals, holding that

> "Proof which would be relevant on the issue of general fraud is not necessarily relevant on a deter-

> mination of whether the statements here involved were in fact true or false."
>
> 338 F. 2d at 617-18,

made virtually conclusive the presumption of guilt which the trial court invited the jury to indulge.

Respectfully submitted,

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Judgment.

(November 27, 1964)

EXTRACT FROM THE MINUTES OF
NOVEMBER 27, 1964

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 20140

D. C. Docket No. 12,340-M-Cr.

CALVIN KOVENS and LEON COHEN,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

Before TUTTLE, Chief Judge, JONES and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 27, 1964

Issued as Mandate:

Opinion.

(November 27, 1964)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20140

CALVIN KOVENS AND LEON COHEN,

Appellants,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(November 27, 1964.)

Before TUTTLE, Chief Judge, JONES and GEWIN, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from the conviction, based on a jury verdict of guilty, of the two appellants on four counts each of a ten-count indictment charging violation of, and a conspiracy to violate, Title 18 U.S.C.A. § 1014 providing in substantial part: "Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of . . . a Federal Savings and Loan Association . . . upon . . . advance . . . shall be fined not more than $5000 or imprisoned not more than two years, or both." Appellant Kovens was the President and appellent Cohen the Secretary of one of the corpora-

tions involved in the transaction with the Miami Beach Federal Savings and Loan Association.

The first three substantive counts of the indictment charged Kovens with having made specific false statements. In view of the attack made by the appellants on the indictments themselves, it is necessary that the exact language of the indictment be quoted. With the exception of the dates and amounts involved each of the second and third counts are similar to the first, which was as follows:

> "That on or about the 8th day of December, 1958, at Miami Beach, Dade County, in the Southern District of Florida, Calvin Kovens, the defendant herein, in the capacity of President of the Cal Kovens Construction Corp., Miami Beach, Florida, did knowingly and willfully make a false statement and report for the purpose of influencing the action of the Miami Beach Federal Savings and Loan Association, Miami Beach, Florida, a Federal Savings and Loan Association, in advancing funds pursuant to a Construction Loan Agreement dated the 5th day of December, 1958, between the said Miami Beach Federal Savings and Loan Association, Ruedd, Inc. and Cal Kovens Construction Corp., all of Miami Beach, Florida, in that the said Calvin Kovens on or about the 8th day of December, 1958, did submit to the said Miami Beach Federal Savings and Loan Association at Miami Beach, Florida, a Construction Draw requesting payment of the sum of $149,946.86 from funds held in escrow by the said Miami Beach Federal Savings and Loan Association for the said Ruedd, Inc. pursuant to the terms of the said Construction Loan Agreement, and certifying that the funds enumerated in the said Construction Draw and itemized on the reverse side thereof had been expended for the sole purpose of constructing the improvement on the property described therein, whereas in truth and in fact, as the said Calvin

> Kovens then and there well knew, the said Construction Draw was false in that the entire amount of the funds enumerated in the said Construction Draw and itemized on the reverse side thereof was not expended for the sole purpose of constructing the improvement on the property described therein, in violation of Title 18, United States Code, Section 1014."

In general, whereas Count One dealt with the first "Construction Draw" on the building contract, Counts Two and Three dealt with the second and third "Construction Draws" respectively.

Count Four was dismissed by the court before trial. Count Five dealt with an alleged false statement of cash on hand and resulted in a verdict of not guilty by the jury. Counts Six, Seven and Eight alleged Cohen's participation in the same three allegedly false statements dealt with in Counts One, Two and Three.

Count Nine was stricken by the trial court before trial. Count Ten undertook to allege the conspiracy between Kovens and Cohen. It charged that during the period alleged the two defendants

> "did knowingly, willfully and unlawfully conspire and agree together and with each other to commit an offense against the United States, to-wit: ¶ To make a false statement and report to influence the action of a Federal Savings and Loan Association upon an application for advance of construction loan funds, and thereby commit an offense against the United States in violation of Section 1014, Title 18, United States Code."

It further alleged

> "that it was a further part of the said conspiracy that the defendants, Calvin Kovens and Leon Cohen,

> would prepare for submission and submit to the said Association pursuant to the terms of the said agreement Construction Draws, which misrepresented the funds disbursed by the said Cal Kovens Construction Corp., and requested the disbursement of Construction Escrow funds to the said Cal Kovens Construction Corp. in excess of the monies actually expended by the said Cal Kovens Construction Corp. in the construction of the said shopping center."

In response to a motion by the appellants for a Bill of Particulars, the trial court entered an order "requiring the United States to state what funds, drawn under the provisions of the construction loan agreement, are claimed to have been diverted or not expended for the sole purpose of constructing the improvements on the property described in the loan agreement. . . ."

The Bill of Particulars filed by the United States, undertook to specify in some detail certain items purportedly included in the total amounts specified as each of the three Construction Draws which the Government charged "had not in fact been expended as alleged." Appellants made no further contention that the itemization of the amounts by which the three Construction Draws were alleged to be false was not sufficient to meet their requirements in preparing for trial.

In order better to understand the facts surrounding the transaction resulting in the indictments, it is necessary only to know that the appellants were President and Secretary respectively of the Cal Kovens Construction Corp. which had a construction contract for the building of a shopping center on land on a leasehold owned by Ruedd, Inc., a corporation of which Kovens was also President; that Kovens, Ruedd and the Association had entered into a "construction loan agreement" which, among other things, provided for current funds to provide for construction costs upon certain conditions. One of these

conditions was at the time of any payment made to the owner or contractor "The Contractor or Owner shall submit to the Association waivers of liens from the Contractor and materialmen, and a final survey together with such other evidence as it may desire, showing that all payroll, material bills and any and all other indebtedness occurred in the course of the construction have been paid in full."

The three Draws which the Government claimed contained false statements were in the form of a sworn statement requesting the payment of the stated amount and containing the following language.

> "That the funds requested in the sum of 149,946.86 Dollars, enumerated in the draw above and itemized on the reverse side hereof have been expended for the sole purpose of constructing the improvement on the following described property, to-wit: [Here was the description of the property]
>
> "That this affidavit is made for the purpose of inducing the Miami Beach Federal Savings and Loan Association, of Miami Beach, Florida, to make payment of the above draw according to the terms and provisions of the Escrow Agreement made a part of their mortgage loan."

Each of the statements appears to have been signed and sworn to by Kovens. None of the statements contained an itemized list of expenditures "on the reverse side hereof" but each of them had associated with it a statement on the letterhead of Cal Kovens Construction Corp., addressed to Miami Beach Federal Savings and Loan Association, and marked, Re: Ruedd, Inc., and under that, Requisition No. 1, 2 or 3 respectively. This statement then contained an itemized list of what appeared to be subcontracts totalling the full amount of the general contract of $1,000,250, an item showing "Requis. Previous" which on the first statement was blank, a column showing "Balance before Req." the

items of which on the first statement would, of course, equal the total Contract Price of $1,000,250, a column headed "This Requis." the items of which in the first statement totalled $149,946.86 and then a column headed "Balance" which would show the balance due on each subcontract.

It was the thrust of the Government's case, as disclosed by the indictment, followed by the Bill of Particulars, that as to several items on each of the itemized statements submitted with the respective Construction Draws the amount stated had not been paid at all or had not been paid in full or, in any event, had not been paid to the purported payee or subcontractor. The Government's proof with respect to this item consisted in nearly every case of proof that a receipt or purported discharge or waiver of lien executed by the party whose name is shown as a subcontractor did not in fact speak the truth, either because the receipt or waiver of lien stated an amount in excess of payments actually made or no such contract or payment was made at all to the particular indicated payee or subcontractor.

The appellants here make a four-pronged attack on their conviction. They first contend that the Grand Jury that indicted appellants was illegally constituted and that therefore they could not be legally tried or convicted. Their next attack challenges the sufficiency of the indictment itself. The third ground of complaint is that the evidence was insufficient to convict the appellants on the charges made by the indictment. Finally, appellants contend that they did not receive a fair trial because of the inadequacy of the Bill of Particulars and what they charged to be a change in the view of the trial court as to the issues involved as contrasted with another trial judge who had entered the pre-trial order; and on the further ground that they were denied the opportunity to introduce testimony which, according to their view of the case, was material to their defense.

Opinion.

Dealings first with the attack on the Grand Jury that indicted appellants, our path is clear. In their brief here, appellants say, "Unquestionably, the issue decided by a panel of this Court in Chance v. United States, 5 Cir., 322 F.2d 201, is the same issue that appellants desire to present in this case. The question is presented in the same way and on the same record, but the decision in Chance v. United States was an incorrect decision and should not be followed." In *Chance* v. *United States* this Court held that the Grand Jury had not been illegally constituted. By familiar rules of *stare decisis* we will not disturb that determination.

We turn next to the contention that the indictment does not charge an offense. This contention is without substance. A reading of the indictment, *supra*, makes it plain that the appellants are charged with having submitted a Construction Draw requesting payment of the sum of $149,946.86 from funds held in escrow by the Association and certifying that the funds enumerated in the Draw and itemized on the reverse side thereof had been expended for the sole purpose of constructing the improvement, whereas in truth and in fact to the knowledge of the appellant the Draw was false in that the entire amount of the funds enumerated and itemized was not expended for the sole purpose of constructing the improvements. There is nothing said by this Court in *Van Liew* v. *United States*, 5 Cir., 321 F.2d 664, that would warrant our holding that the language used in the three counts against Cohen did not adequately meet the requirements of setting forth with clearness and all necessary certainty the alleged crime for which the defendants were being tried.

The argument by appellants that "the alleged false statement set forth in the indictment is . . . intrinsically meaningless and absurd" because it alleges that the certificate certified that certain funds had been expended, whereas it also alleged that the "fund" referred to was

the escrow deposit from which reimbursement was to be made and that "before the funds were drawn and paid from the escrow account, those funds had not been and could not have been expended for that or any other purpose" is purely fanciful. The word "fund" like the word "sum" or the word "amount" need not, when viewed in the context that makes it plain what is intended, refer to the same thing in the sense contended for by the appellant here. There is no confusion that the word "funds," which the indictment says the certificate claimed had been expended by the contractor, referred to a sum of money and not the balance which was on deposit in the escrow account, and which elsewhere in the indictment was spoken of as escrow "fund."

Appellants contention that the evidence was insufficient to convict on the charges made by the indictment is based primarily upon appellants' construction of Judge Dyer's analysis of the indictment as expounded by him in requiring a Bill of Particulars. The language which gives rise to this contention is that Judge Dyer required the United States "to state what funds, drawn under the provisions of the Construction Loan Agreement, are claimed to have been *diverted or not expended* for the sole purpose of constructing the improvements." (Emphasis added) The appellants contend that under this construction of the indictment the burden on the Government required that it prove that at the time the construction was completed some part of the money called for by the several Draws and on the final estimate, had been "diverted" or at least had not been "expended for the sole purpose of constructing the improvements."

On the other hand, the Government contends that the language in Judge Dyer's order must be viewed in light of the allegations in the indictment which makes it plain that the time as of which the Government charged the falsity existed was at the time the Construction Draw was submitted, and the test of whether there had been

a diversion or failure to pay the entire amount as itemized was to be tested as of that date. We agree with this construction.

It is plain that the indictment charged that, as to Count One, Kovens on December 8th knowingly caused a false certificate to be filed with the Association for influencing its action in advancing funds in that he submitted a Construction Draw requesting the payment of $149,946.86 and certifying that funds enumerated in the said Draw and itemized thereon *had been expended* as itemized, whereas, to his knowledge the Draw was false in that the entire amount of the funds enumerated was not expended as itemized. It would make no difference whether the amount was thereafter expended or if the amount was spent for a different purpose than that stated on the certificate, including the itemized list associated with it.

On the construction which the trial court and we place on the indictment, there can be no question about the sufficiency of the evidence to warrant a jury's finding that there were false statements contained in the itemized certificate filed on each of the three dates as charged in the three counts of the indictment. The Government had no burden to prove that the sum of $149,946.86 claimed on the first Draw, was not actually spent by Kovens Construction Company in some other manner. Nor was the Government under any obligation to prove that when all of the Construction Draws had been honored and the building had been completed, there had been a failure to pay out the total amount representing all of the Draws.

The statute deals with the falsity of any statement made for the purpose of influencing the Association as to the making of an advance. We agree that the purpose of Section 1014 is to protect authorized functions of specified institutions from "deceptive practices," *United States* v. *Gilliland,* 312 U.S. 86, as contended for by the appellants. But where, as here, the indictment charges

that the appellant "for the purpose of influencing the action of the Association," submitted a Construction Draw requesting payment of the sum of $149,946.86, knowing the statements on said Draw to be false, it can hardly be said that there was an absence of an allegation which would support proof of the materiality of the alleged false statement. Thus, it is plain that the indictment alleges conduct that fully meets the standard which appellants distill from the cases of *Gonzalez* v. *United States*, 10 Cir., 286 F.2d 113, *Robles* v. *United States*, 9 Cir., 279 F.2d 401, and *Brandow* v. *United States*, 9 Cir., 268 F.2d 559; that is, that it alleges conduct which "must intrinsically tend to influence or be capable of influencing the institution to act favorably upon the application in respect of which the statement is made." This indictment clearly set forth facts from which the intrinsic capacity of the statement to influence favorable action may fairly be deduced.

What we have decided with respect to the counts charging Kovens, applies with equal force as to the counts charging Cohen with Guilt. Cohen's connection with the statements was adequately proved.

Turning now to the conspiracy count, we think that a reading of this count as quoted above makes it perfectly plain that a conspiracy to violate the Federal Criminal Statute is adequately charged. No elaboration of this view is required.

Turning next to the contention that the evidence was not sufficient to warrant submission of the case to the jury, we conclude that this contention is made on an incorrect understanding by appellants of the issue before the trial court. That is to say, it is based on a contention by the appellants that the burden on the Government was to prove that the total funds covered by all the Draws were not expended on the construction job. It can hardly be argued seriously that there was not sufficient proof to show that as to the particulars set forth

in the Bill of Particulars specified items certified to "have been expended" had not in fact been expended at the time of the filing of the statement in accordance with the itemization submitted as a part of the Draw. We have no doubt but that there was adequate evidence to warrant the jury's finding that the certificate contained false statements which were in the language of appellant Kovens himself "made for the purpose of inducing the Miami Beach Federal Savings and Loan Association. . . to make payment of the" amounts requested.

Finally, with respect to the challenge as to the fairness of the trial, the argument runs that a pre-trial conference held two days before the trial, the trial court determined that evidence attempting to show that in fact the total amount covered by the escrow arrangement had ultimately gone into the construction project and/or that, at the time the Draws were submitted, an amount equalling the total amount of the Draw had actually been expended on the project would not be received in evidence, and that the testimony should be restricted to the truth or falsity of the statement and the items accompanying it.

Appellants contend that this ruling by Judge McRae, the trial judge, was in conflict with an earlier order of Judge Dyer in requiring that the Bill of Particulars be filed. We find no such conflict and we concur in Judge McRae's determination as to the issue before the jury. The indictment was not brought on a general charge of fraud in drawing money from a Federal Building and Loan Association for construction work which was not spent for the purpose intended, but is based upon a particular statute that prohibited the making of false statements for the purpose of influencing the conduct of such an association in the expenditure of its funds. There is ample basis for Congress to have a concern about the latter matter as well as for the former. Proof which would be relevant on the issue of general fraud

is not necessarily relevant on a determination of whether the statements here involved were in fact true or false. With this construction of the alleged offense in mind, we conclude that the trial court did not err in rejecting the testimony tendered by the appellants.

We conclude that the appellants had a fair trial upon an indictment that fairly apprised them of the charge against them and that the evidence fully justified the verdict of guilt.

The judgment is AFFIRMED.

Order on Petition for Rehearing.

(February 4, 1965)

[110]-Tuttle

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20,140

CALVIN KOVENS and LEON COHEN,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(February 4, 1965)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, JONES and GEWIN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

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769-350—65——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 961

CALVIN KOVENS AND LEON COHEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22–33) is reported at 338 F. 2d 611. The opinions of the district court (R. 45–48, 172–173) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1964 (Pet. App. 21). A petition for rehearing was denied on February 4, 1965 (Pet. App. 34). The petition for a writ of certiorari was filed on March 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether various trial rulings on the evidence were proper.

2. Whether the trial court's instructions to the jury on the question of intent were proper.

STATUTE INVOLVED

Section 1014 of Title 18, U.S.C., provides, in pertinent part:

> Whoever knowingly makes any false statement or report * * * for the purpose of influencing in any way the action of * * * a Federal Savings and Loan Association * * * upon any application, advance, * * * commitment, or loan, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

A ten-count indictment returned in the United States District Court for the Southern District of Florida charged petitioners with having knowingly and willfully made false statements to the Miami Beach Federal Savings and Loan Association for the purpose of influencing the Association to advance funds pursuant to a "Construction Loan Agreement" for the construction of a shopping center in Miami and with having conspired with each other to commit such an offense, in violation of 18 U.S.C. 1014 and 371 (R. 4–19). The petitioners were charged separately in the substantive counts which alleged that the false statements took the form of "construction draws", which were false in that they contained certifications that specific sums of money, itemized separately in schedule form, had been spent by the

contractor solely in constructing particular improvements when, as petitioners knew, such amounts had not been so expended in their entirety (R. 4–8, 9–13). After a trial by jury, each petitioner was convicted on three substantive counts and on the conspiracy count (R. 54).[1] Kovens was ordered to pay a fine of $3,000 on each of the four counts, for a total fine of $12,000, and was placed on probation for five years (R. 829–830). Cohen was ordered to pay a fine of $200 on each of the four counts, for a total fine of $800, and was placed on probation for two years (R. 831–832). The court of appeals unanimously affirmed (Pet. App. 21, 22–33).

The pertinent facts may be summarized as follows:

1. *The contract and preliminary arrangements.* During the relevant periods, petitioners Kovens and Cohen were the president and secretary, respectively, of the Cal Kovens Construction Corporation ("the Corporation"), a Florida corporation, the stock of which was owned by Kovens. Cohen was the office manager of the Corporation and supervised its bookkeeping operations and the office personnel (R. 499–501, 504, 599, 664). Ruedd, Inc., ("Ruedd"), also a Florida corporation, owned a 99-year leasehold on a tract of unimproved land in Miami. During the relevant periods, Kovens was the president of Ruedd. He owned about 20 percent of its stock to about the end of 1958, when he became a 97 percent stockholder (R. 128, 618, 634, 668). On December 31, 1958, Cohen became secretary of Ruedd (R. 128–130, 585, 598, 664).

On August 11, 1958, Kovens, on behalf of Ruedd,

[1] Two counts were dismissed before trial (counts 4 and 9), and Kovens was found not guilty on the remaining count (count 5).

applied to the Miami Beach Federal Savings and Loan Association ("the Association") for a construction loan of $742,000 in order to finance construction of a shopping center on Ruedd's leasehold interest (R. 364, 367, 377–381, 547–548, 571–572, 620–621, 625, 626, 863–865). The application recited, *inter alia,* that Ruedd had "Cash on hand" of $300,000 (R. 863). An accompanying "Appraisal Report" specified ten agreed-upon conditions to the granting of the loan, two of which were that the cash difference between the total cost of construction (approximately $1,000,000) and the proceeds of the loan (approximately $700,000), was to be supplied by Ruedd; and that "[f]ailure of $300,000 cash by Ruedd Corp. causes default in mortgage" (R. 552, 569–570, 623–624, 865). The tentative agreement, spelled out in the Appraisal Report, provided that Ruedd would put up the first $150,000 which would be spent before disbursement by the Association of any of the loan proceeds; the next $150,000 would be disbursed out of the loan proceeds; then, at the demand of the Association, Ruedd was to put up another $150,000 before the balance of the loan proceeds would be available for disbursement (R. 552, 554, 569–570, 865; see R. 392, 437–438, 446–447, 450–451, 876). At the time of the loan application, Ruedd had a cash position of about $160 (R. 473).

On August 15, 1958, the Corporation and Ruedd entered into a contract whereby, for $1,000,000 from Ruedd, the Corporation, as general contractor, agreed to construct a shopping center on Ruedd's leasehold

interest (R. 627–629, 920–924). Shortly thereafter, the Association approved the loan.

On December 5, 1958, the Corporation, Ruedd and the Association entered into a "Construction Loan Agreement" which embodied, *inter alia,* the agreements regarding the money to be put up by Ruedd and the manner of disbursement of the first $450,000 (R. 390, 392, 397–400, 443, 556–557, 876–879, 918–919). The agreement provided that Ruedd was to deliver $150,000 to the Association forthwith, and that the proceeds of the loan, together with the monies supplied by Ruedd, would be deposited in a "Construction Escrow Fund" for eventual disbursement (R. 876–877; see R. 918–919). The Association alone could disburse monies from the escrow fund, and it could do so only in connection with the shopping center construction (R. 451, 565, 572–573, 876, 877). The "basic understanding" of the parties was that the Association would disburse funds from the escrow fund only upon receipt of paid bills and releases of liens and certification from the Corporation or Ruedd that the bills of subcontractors and materialmen had been paid (R. 574, 576, 877).

Ruedd and the Corporation obtained the $150,000 down payment by a loan from the Coral Gables First National Bank of Coral Gables, Florida, for which they gave a 90-day note, with personal indorsement by Kovens (R. 457–461, 474, 635, 670–672, 675–676, 901, 902). At that time, Ruedd had a cash position of about $1,500. The note payable was not recorded in Ruedd's books of account (R. 474–475).

2. *The false representations.* On December 8, 1958, January 9, 1959, and February 24, 1959, Kovens or the Corporation submitted "Construction Draws" to the Association which requested the Association to draw a total of $650,000 from the construction escrow account in favor of the Corporation (R. 424, 674, 677, 880–883, 885–888, 889–892). Affidavits of Kovens, which were contained in each construction draw, recited, in part (R. 880, 885, 889), that the funds requested "have been expended for the sole purpose of constructing the improvement" according to the terms of the mortgage and escrow agreement.

There was submitted with each construction draw detailed itemizations of construction costs incurred and paid, together with supporting documents which included partial releases of lien from various subcontractors and materialmen (R. 403–405, 410–411, 418–419, 424–425, 882–883, 887–888, 891–892). The amounts of money requested in the draws equaled the total amounts of the expenditures certified therein as having been expended in construction of the project. The Association checked the itemized expenditures against the supporting documents in order "to see that it corresponded with the amount that was being requested to be paid out" (R. 361, 403–404, 445). After the draws had been checked and approved, the Association disbursed funds to the Corporation in accordance with the draws (R. 445–446, 884, 899, 900).[2]

[2] The difference between the amount the Corporation received under the second draw (or $123,637.84) and the amount requested in such draw (or $149,537.84), was due to the fact that the Association had been requested by the Corporation to pay certain expenditures directly in the amount of $25,900, thus

Four itemized expenditures in the first draw, two in the second draw and three in the third draw were alleged by the bill of particulars (R. 50–52) and shown by the proof to have been false. For present purposes, we set forth the particulars regarding item number 11 of the first draw (December 8, 1958) as illustrative of the other false items. Item number 11, in the amount of $25,721 for "Fill" (R. 882), was supported in part by a partial release of lien for $24,940 from the Marx Brothers Company, dated November 15, 1958 (R. 349–351, 861–862). Actually, however, no payment had been made to the Marx Brothers (R. 469, 602), and Mr. Herman Marx testified that his firm's total services with regard to the shopping center project amounted to about $600. He said that he "seriously doubt[ed]" that the $24,940 figure was on the partial release of lien form when he signed it (R. 348-351, 355–356).

The various subcontractors and materialmen who performed services or supplied materials for the Corporation at the construction site generally dealt with Cohen in matters of obtaining payment and signing releases of lien (R. 246–248, 258, 284–287, 300, 340–341, 346–347, 500–501, 594–595, 597, 599–600, 664). Cohen witnessed or received all of the pertinent releases of lien and made out most of the checks to the sub-contractors and materialmen (R. 246, 248, 258, 280–281, 300–301, 340, 350, 500–503, 599–600, 601, 602,

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leaving a net amount to the Corporation of $123,637.84 (R. 575, 577–578, 885, 887–888, 899). A similar arrangement existed in the third draw, with the Association being requested to pay out expenditures totaling $25,780 (R. 889, 891–892, 900).

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608, 842, 845, 848, 849, 851, 856, 859, 862, 894, 895, 896). These checks were signed by Kovens (R. 500–501, 843, 846, 852, 853, 857, 860, 904).

Expenditures were overstated in the first draw by about $66,000; in the second draw by about $30,000; and in the third draw by about $75,000. In the meantime, the Corporation paid off the $150,000 note liability to the Coral Cables Bank (R. 475, 671–672, 880, 885, 889, 902).

On February 24, 1959—the date that the third construction draw was submitted—the Corporation gave the Association a check for the second $150,000 deposit which the Association had demanded (R. 649–650, 672, 889, 916). This money had been borrowed by Kovens from a Miami Beach bank and deposited on the previous day in the Corporation's checking account (R. 475–476, 649–650, 672, 906). This was the same bank account where the Corporation deposited the checks received from the construction draws (R. 475–476, 672). On February 25, 1959, a number of checks, including one for $150,000 (the second $150,000 check given to the Association) cleared the Corporation checking account. Had it not been for the deposit of the proceeds of the third draw (about $350,000) on the following day, the account would have been overdrawn by about $150,000 (see R. 906, 916). Petitioners thus obtained 100 percent financing of the construction costs of the shopping center from borrowed funds (see R. 735–736, 771).

ARGUMENT

1. Before trial, the district court directed the government to furnish particulars showing "what funds,

drawn under the provisions of the construction loan agreement, are claimed to have been diverted or not expended for the sole purpose of constructing the improvements on the property described in the loan agreement" (R. 46). The government furnished a bill of particulars which enumerated the items in the three construction draws which "had not in fact been expended as alleged" (R. 50–52). At a pre-trial conference, counsel for Kovens took the position that the "sole issue" in the case was whether the defendants had "wrongfully diverted" funds obtained from the Association in the sense that those funds were not expended on the shopping center (R. 155–156). The government responded that it did not have to show that the money was not ultimately spent on the construction, but that it was enough to show that the statements in the construction draws were false in the sense that the representations that money had been expended were untrue (R. 152, 157–158).

Before the case went to trial, Judge McRae, in defining the issues of the case, ruled that the indictment charged the offense of knowingly making a false statement for the purpose of influencing action of the Association and said (R. 172–173):

> Whether or not the Savings and Loan association was later pleased with the work or whether or not at some other or different times, monies were expended, and whether or not an accounting was taken subsequently to the completion of the job which showed something or other. It seems to me that that does not go to the heart of the case in any respect, and evidence on those points will not be received.

In other words, it was the government's theory that petitioners had falsely "padded" several items in each of the construction draws, and that the money which they represented as paid to the enumerated firms was, in fact, not paid to those firms at that time or, in the case of certain other firms, at any time during the construction of the property. Although there was no evidence that the funds had been taken for petitioners' personal use, it was a fair inference that the "padding"—*i.e.*, the excess over actual monies certified to have been expended on particular dates—was used to pay for the initial loan obtained by Ruedd from the Coral Gables Bank. In this manner petitioners misled the Association into believing that the amounts paid on each draw were secured by particular construction which had been paid those full amounts; in fact, petitioners were overstating the cost of certain construction and using the excess to repay the initial loan to Ruedd.

Petitioners' various challenges to the district court's rulings on evidentiary questions (Pet. 8–9, 10–11) are based on a misinterpretation of the charge against them:

a. The court properly refused to admit evidence showing the total amount of money spent by the Corporation on the project as of December 8 or 9, 1958 (R. 485–487; see Pet. 9). Counsel for Kovens explained to the court that the breakdown "probably didn't go to the people named but it was paid on this job, and we say that their books will so reflect" (R. 486). But the issue on falsity was simply whether the particular amounts of money enumerated and itemized in the draws as certified expenditures on

the project as of the dates the draws were submitted had in fact been so expended. The Association authorized payment on each of the draws in reliance upon the specific enumeration made therein. The falsity of those representations was not cured by the fact that *other* subcontractors and materialmen had been or were to be paid.

b. Petitioners offered evidence (see R. 566, 579–581) of the alleged common practice that (see R. 581):

> when these construction draws are requested, there are partial releases of liens attached thereto, and it is known by both sides that that does not mean that the bills, or the amounts indicated by the request on the construction draw and partial release of lien have in fact been paid prior to that time.

The court properly rejected such evidence since the general practice, even if proved, had no bearing on the issue whether petitioners' draws could be "padded" by such misleading releases of lien. Nor did the custom and practices of other lending institutions in the Miami area bear upon the permissibility of this practice. It was not suggested in the offer of proof that other banks or loan institutions willingly authorized payment for nonexistent construction or padded construction costs.

c. Kovens was asked by his counsel whether he had any discussion with "Mr. Brown or any members of the bank" about the "formality" of the draws, and he replied (R. 636):

> No, sir. The bank had mentioned to me that they were not concerned with any draws, because of the many jobs.

The court's ruling sustaining an objection to this testimony was correct. The "formality" of the draws was not at issue since, even if informal procedures had been agreed upon, petitioners would not have been entitled to engage in misrepresentation. Moreover, both the question—which referred to "members of the bank"—and the answer—which responded in terms of "[t]he bank"—failed to identify any particular speaker. Hence, they were inadmissible as phrased.

d. The court properly struck from the record Kovens' testimony that the Association "approved for the air conditioning to be given on a note basis" and refused to rule that the giving of a promissory note amounted to "payment" (R. 651, 660–661; see Pet. 9). The record shows that the Corporation gave a $20,000 note to Bransfield & White and a $50,000 note to Sam Hamilton in connection with work actually done on items 13 and 36 of the third construction draw, respectively (R. 51–52, 260–261, 597, 604). But there is nothing in the record to show that the parties understood the notes to constitute "payment" of the underlying indebtedness,[3] or that the Association would have agreed that such notes were payment. Indeed, "payment" by note could not have been payment "in full" required by the construction loan agreement (see R. 876–877), since the obligation on the contractor's part to make payment still existed. Moreover, even if the offer of proof should have been accepted, that would not have affected the other false

[3] Sam Hamilton did not testify. Bransfield testified that his company "would not record a note as payment" (R. 260). (Emphasis added.)

item in the third construction draw—petitioners' $5,000 "padding" of a bill for "electric" expenses (R. 302–304, 850–852).

2. The court's charge properly placed the issue of intent before the jury. The court said in part (R. 778–779):

> Now, before you can convict these defendants Calvin Kovens and Leon Cohen, you must find that the Government has presented credible evidence and testimony which convinces you to the exclusion of and beyond any reasonable doubt that Calvin Kovens and Leon Cohen did:
>
> (1) Act voluntarily and purposely and not because of mistake or inadvertence or other innocent reasons; and
>
> (2) That they acted with a specific intent to violate the law; and
>
> (3) That they actually made or caused to be made the false statements alleged; and
>
> (4) That they did so for the purpose and intention of influencing the Miami Beach Federal Savings and Loan Association in advancing funds pursuant to a construction loan agreement dated December 5, 1958; and
>
> (5) That it was a material representation which means that it was important and more or less necessary, intending to influence; and
>
> (6) That each and every one of these elements have all been proved; for if the Government fails to prove any one of these elements beyond and to the exclusion of a reasonable doubt, it is your duty to acquit the defendants.

The court then defined the terms "knowingly", "wilfully" and "false", and reiterated the necessity for

the government to prove the materiality of the alleged false statements (R. 779–780).

The decision below, therefore, is clearly not in conflict with *Morissette* v. *United States,* 342 U.S. 246, as petitioners argue (Pet. 12–15). In *Morissette,* the trial court refused to permit one accused of larceny to defend on the basis that he believed the property taken to have been abandoned, ruling that, as a matter of law, the requisite intent was to be presumed from the act of taking the property. In the instant case, however, the court charged that while a person is presumed to have intended the natural and probable consequences of acts knowingly done or knowingly omitted, the jury nevertheless was entitled "to consider any statements made and acts done by Calvin Kovens and Leon Cohen, and all facts and circumstances in evidence which may aid determination of state of mind, remembering that his intent and knowledge must be proved beyond and to the exclusion of a reasonable doubt" (R. 786).[4]

Petitioners also complain that the Fifth Circuit did not follow its own decision in *Mann* v. *United*

[4] In *Smith* v. *United States,* 230 F. 2d 935 (C.A. 6), cited by petitioners, the court held that the trial court ignored the element of criminal motive and guilty mind when it instructed the jury that they should convict if they believed beyond a reasonable doubt that the defendant knew that the proceeds of the F.H.A. loan would not be applied as stated in the loan application, stating that the instruction did not take into consideration the fact that there was undisputed evidence that a bank official had advised the defendant that the loan proceeds could be used "to pay for improvements already completed, that is, for existing debts." 230 F. 2d at 938. The situation here is quite different. The other cases cited have no bearing on this case.

States, 319 F. 2d 404, certiorari denied, 375 U.S. 986, reversing a tax fraud conviction because the judge had instructed that "unless the contrary appears from the evidence" the jury could infer that the defendant intended the natural and probable consequences of his acts. The court found the instruction defective because the words, "unless the contrary appears from the evidence" operated to shift the burden of proof "from the prosecution to the defendant to prove lack of intent." 319 F. 2d at 409. In the instant case, an almost identical instruction appears (R. 786). In this case, however, unlike *Mann,* the instruction in question was preceded and followed by unequivocal directions to the jury that the government retained the burden of proving all elements of the offenses, including that of intent. Thus, the court charged that to convict the petitioners the government had to prove beyond a reasonable doubt that the petitioners, *inter alia,* acted "voluntarily and purposely" and with a "specific intent to violate the law" (R. 778–779; see R. 785). After the instruction in question was given (R. 786), the court charged that petitioners' "intent and knowledge must be proved beyond and to the exclusion of a reasonable doubt"; and that the "burden of proof is upon the Government, from beginning to the end of the trial; and this burden never shifts from the Government to the defendants; the defendants are not bound to explain anything, and their failure to explain anything connected with this case cannot be considered by you as a circumstance tending to prove their guilt" (R. 786,

790). Thus, the instruction in question could not have had the effect of shifting the burden of proof on intent from the prosecution to petitioners.[5]

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1965.

[5] In *Sherwin* v. *United States*, 320 F. 2d 137, certiorari denied, 375 U.S. 964, the Ninth Circuit upheld the same instruction which the Fifth Circuit condemned in *Mann*. Despite the conflict, this Court denied certiorari in *Mann* (375 U.S. 986) and in *Sherwin* (375 U.S. 964). See also *Estes* v. *United States*, 335 F. 2d 609, 615–616 (C.A. 5), certiorari denied on January 18, 1965, No. 601, this Term.

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IN THE

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OCTOBER TERM, 1964.

No. 961.

CALVIN KOVENS and LEON COHEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF.

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STATUTE.

Title 18 United States Code,
Section 1014 1

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PETITIONERS' REPLY BRIEF.

The trial court's ruling that "the testimony should be restricted to the truth or falsity of the statement and items accompanying it" (opinion of court of appeals, A. 32) and the ruling of the court of appeals that

> "Proof which would be relevant on the issue of general fraud is not necessarily relevant on a determination of whether the statements here involved were in fact true or false. With this construction of the alleged offense in mind, we conclude that the trial court did not err in rejecting the testimony tendered by the appellants."
>
> Opinion, A. 32-33,

raise these fundamental questions:

1. Is proof of criminal intent essential to a conviction of the offense proscribed by Title 18 U. S. C. §1014, one of the "Fraud and False Statements" statutes in Chapter 47, United States Code?

2. If so, what kind of evidence may a citizen charged with that crime adduce at his trial to show that he had no criminal intent?

In its brief in opposition the Government does not deny that criminal intent is an essential element of the offense. That could not reasonably be denied. *Morissette* v. *United States* (1952), 342 U. S. 246; see also *Smith* v. *United States* (6th Cir. 1956), 230 F. 2d 935; *Rhodes* v *United States* (4th Cir. 1960), 282 F. 2d 59; and *United States* v. *Niro* (2d Cir. 1964), 338 F. 2d 439. It therefore seems to us a special and important reason for granting the writ that, while the Government does not contest that criminal intent is an essential element of the offense, petitioners stand convicted under a "construction of the alleged offense" (opinion of the court of appeals, A. 33) that limits the jury's inquiry to "the truth or falsity of the statement and the items accompanying it" (opinion, A. 32).

The Government's argument in opposition to granting the writ is not that the issue of criminal intent was irrelevant to the case but that the evidence offered by petitioners was irrelevant to that issue. That argument would seem to conflict with, and not to justify, the lower court's explicit holding that the proffered evidence was

> "not necessarily relevant on a determination of whether the statements here involved were in fact true or false."
>
> Opinion, A. 33.

Moreover, that argument forcefully demonstrates how a citizen may be accused of having acted with criminal intent, be assured by the court and prosecutor that he cannot be convicted unless he acted with criminal intent, and yet be utterly frustrated in his attempt to show the jury, by cogent evidence, that he did not.

In a baseless but apparently irresistible argument that has recurred in this case like a nightmare, the Government again asserts, in its brief in opposition, that petitioners "falsely 'padded' " the construction draws submitted to the Association (brief in opposition, p. 10); that petitioners "misled the Association" by "misleading releases of lien" (brief in opposition, pp. 10, 11); that petitioners "were overstating the cost of certain construction and using the

excess to repay the initial loan to Ruedd" (brief in opposition, p. 10); and that the petitioners sought payment from the Association "for nonexistent construction or padded construction costs" (brief in opposition, p. 11) in order to obtain "100 percent financing of the construction costs of the shopping center from borrowed funds" (brief in opposition, p. 8).* The Government argued in like vein to the jury (R. 733-37, 764-72) and, with equally telling effect, to the court of appeals.

These recurring arguments are all the more difficult to overcome because they are based not on evidence but on suppositions that are plausible only because the substantial evidence to the contrary, offered by petitioners to show the truth about their intentions in dealing with the Association, was largely excluded by the trial judge as being foreign to "a determination of whether the statements here involved were in fact true or false" (opinion of court of appeals, A. 33). We shall not again set forth at length the excluded evidence (see petition, pp. 7-9) but only say, in summary, that it tended to show that, any legalistic interpretation of the loan agreement to the contrary notwithstanding, the Association and the contractor knew and intended that the loan funds would be disbursed on the basis of the value of the work incorporated in the job [as permitted by the A. I. A. form of contract between the owner and contractor (R. 922) specifically referred to in the construction loan agreement between the Association, the owner and the contractor (R. 876)] and not mechanically

* The Government does not deny that the shopping center was successfully completed, that every bill was paid, and that every subcontractor who had a lien released or waived it and never asserted it. The Government suggests, as illustrative of the way in which petitioners purportedly misled the Association, that petitioners submitted a partial release of lien executed by Marx Brothers to release its lien in consideration of the sum of $24,940. Yet, it is not suggested that Marx Brothers thereafter had or asserted a lien, or that $24,940 was not actually expended for fill. In fact, the fill work was done by the Kovens Corporation itself, which, of course, was entitled to be reimbursed for that cost, and the Marx Brothers' release was submitted through error (R. 592, 593, 880).

on a showing of paid bills aggregating the amount to be drawn; and that, in any event, the contractor had invariably expended in the job, at the time each draw was submitted, an amount exceeding the amount sought to be drawn.

Throughout the trial and on appeal, when petitioners sought to refute such extravagant claims as that "petitioners were overstating the cost of certain construction" (brief in opposition, p. 10), the Government invariably dismissed petitioners' response as irrelevant. For example, the following occurred at the trial when the prosecutor put that particular accusation in his cross-examination of petitioner Kovens:

> "By Mr. Paisley [the prosecutor]:
>
> "Q. You prepared this case with your lawyers. What is the total amount of the alleged overstatement as to Draw No. 1?
>
> . . .
>
> "A. So far as I am concerned, sir, the work was all in the project and most probably well ahead of any requisitions put in from our company as our records and history would show, sir.
>
> "Mr. Paisley:
>
> "Your Honor, I ask the Court to instruct the witness to answer the question.
>
> "The Court:
>
> "Answer the question, Mr. Kovens. That is not a responsive answer.
>
> "A. I deny it, sir."
>
> R. 677, 678.

The court of appeals held that, in making such rulings, the trial judge properly

> "determined that evidence attempting to show that in fact the total amount covered by the escrow arrangement had ultimately gone into the construction project and or that, at the time the Draws were submitted, an amount equalling the total amount of the Draw had actually been expended on the project would not be received in evidence. . . ."
>
> Opinion, A. 32.

In holding that the matter for determination by the jury was "the truth or falsity of the statement and the items accompanying it" (A. 32), the courts below assumed, *sub silentio*, that petitioners indeed made and intended to make the statement attributed to the draw papers by the Government. This assumption was indulged in spite of the fact that petitioners insisted and offered to prove that no one who dealt with the prolix and ambiguous draw and lien release forms—not the materialmen, nor the contractors, nor even the Association (see petition, p. 8)—attributed to them the meaning insisted on by the Government.

In *Morissette*, the trial judge committed fundamental error in holding it irrelevant that the bomb casings had the look of abandoned property and that the accused thought them abandoned and so took them away. Presumptive intent, this Court said (342 U. S. at 275), had no place in that case. Here, the error was less obvious and hence more insidious. All the while assuring the defendants and the jury that criminal intent is an essential element of the offense and that the jury might

> "consider . . . all facts and circumstances in evidence which may aid determination of state of mind, remembering that his [each defendant's] intent and knowledge must be proved beyond and to the exclusion of a reasonable doubt."
>
> Charge to the jury, R. 786, quoted in brief in opposition, p. 14,

the trial judge consistently excluded evidence of the "facts and circumstances" which might have aided the jury in that determination. Thus, buttressed by the prosecutors' ringing appeal for a verdict that would protect the Association's depositors (R. 737), the court's charge, permitting the jury to infer criminal intent from petitioners' conduct "unless the contrary appears from the evidence" (R. 786), had its inevitable effect.

The petition should be granted.

Respectfully submitted,

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